BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions Of the Telecommunications Act of 1996 The Illinois Public Telecommunications Association's, Petition for A Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders	)))))))))	 CC Docket No. 96-128

REPLY COMMENTS OF THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION ON THE IPTA PETITION FOR DECLARATORY RULING

Numerous parties have filed comments on the Illinois Public Telecommunications Association's ("IPTA") Petition for Declaratory Ruling ("Petition") filed with the Federal Communications Commission ("Commission"). Not surprisingly, representatives of the independent payphone service providers ("PSPs") support granting the IPTA's petition, while the three regional Bell operating companies ("RBOCs") and the Illinois Commerce Commission ("ICC") are in opposition. What is noteworthy though, is how little of the petition's critical elements are contested. The inability to contest the Petition's statements arise from the Petition's reliance on the Commission's own explicit language in its orders. Regarding SBC, there is little debate that it violated both (1) the Commission's requirement to have cost-based rates in compliance with the Commission's new services test effective on April 15, 1997, and (2) the Commission's orders by collecting dial-around compensation since April 15, 1997 prior to being eligible for such compensation. Although the RBOCs and the ICC challenge whether Verizon was subject to the new services test's precondition for eligibility to receive dial-around compensation from April 15, 1997 through January 31, 2002, there is no debate that Verizon did not satisfy that criterion, while nonetheless collecting dial-around compensation.

The following fundamental facts can not be rebutted by the commenting parties:

1. The Commission required SBC to have cost-based rates for services provided to PSPs that complied with the Commission's new services test effective no later than April 15, 1997;
2. The Commission preempted all state regulations inconsistent with this requirement;
3. The Commission required SBC to have cost-based rates in effect to be eligible to receive dial-around compensation for calls originating on SBC payphones;
4. SBC certification of compliance does not substitute for actual compliance prior to being eligible to receive dial-around compensation;
5. SBC rates for services provided to PSPs did not comply with the Commission's new services test prior to December 13, 2003;
6. Verizon rates for services provided to PSPs did not comply with the Commission's new services test prior to January 31, 2002.
7. SBC and Verizon collected hundreds of millions of dollars in dial-around compensation beginning April 15, 1997 through December 13, 2003 and January 31, 2002, respectively;
8. Numerous state regulatory commissions have issued conflicting orders regarding the remedies for violations of the above federal requirements.

Neither the commenting PSPs nor the ICC contest any of the above facts. Only the RBOCs claim that the Commission only required that a Bell Operating Company have in effect tariff, any tariff, for payphone services on April 15, 1997 regardless of whether the tariff provided cost-based rates. Of course, the RBOCs pointedly fail to address any of the explicit language by the Commission to the contrary cited in the Petition. But the Commission left the RBOCs no place to hide. In the Payphone Reconsideration Order, the Commission expressly stated that the local exchange carriers ("LECs") could comply with the cost-based rate requirement prior to April 15, 1997 "but no later than those required dates." *Payphone Reconsideration Order,* ¶ 131. In contrast to the RBOC position that it need only have some payphone tariff in effect on April 15, 1997, the Commission explicitly stated that the tariff must provide cost-based rates.

> ….. the plain language of the Order on Reconsideration provides that state tariffs for payphone services must be cost-based, consistent with the requirements of Section 276, non-discriminatory, and consistent with computer 3 guidelines ….
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> *Bureau Waiver Order,* ¶ 31; Petition at 10.

The *Bureau Clarification Order* went on to emphasis this point.

> ….. the requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, non-discriminatory, and consistent with computer 3 tariffing guidelines….
>
> *Bureau Clarification Order*, ¶ 10; Petition at 11.

The RBOCs claim that they need only have filed tariffs effective April 15, 1997 and not cost-based rates is rejected by the Commission's own emphatic language and conceded by the ICC. ICC Comments at 7.

This raises before the Commission the fundamental issue of the IPTA Petition, enforcement of the Commission's own orders. Despite express Commission requirements, and numerous Commission orders emphasizing enforcement, the Petition squarely places before the Commission clear cut violations of those orders. No party contests that SBC and Verizon failed to provide cost-based rates to PSPs effective April 15, 1997, nor that SBC and Verizon collected dial-around compensation beginning April 15, 1997 without satisfying that prerequisite. Despite claims by the RBOCs in the ICC that there is no controversy or uncertainty to be resolved by a declaratory ruling, they do not deny that numerous state commissions have taken inconsistent position on implementing the Commission's orders or that they controvert the position taken by the PSPs regarding enforcement of the Commission's orders through the provision of refunds of rates in excess of the cost-based rates required. As such, it is facetious for them to suggest that there is no controversy or uncertainty as to the remedies available for these violation of the Commission's orders. The IPTA respectfully submits that its Petition for Declaratory Ruling should be granted.

I. THE COMMENTS ESTABLISH AN OUTSTANDING LEGAL CONTROVERSY AND UNCERTAINTY REGARDING ENFORCEMENT OF FEDERAL LAW.

The Petition asks the Commission to resolve an outstanding legal controversy and to remove an uncertainty with respect to enforcement of the Commission's Payphone Orders regarding the charges for network services provided to payphone service providers pursuant to 47 U.S.C. §§ 201, 202 and 276. Petition at 1. After noting and quoting numerous Commission orders emphasizing the need for cost-based rates effective April 15, 1997, and the Commission's enforcement efforts to implement that requirement, the Petition identifies the uncontested fact that neither SBC nor Verizon had timely implemented cost-based rates. Despite this failure, both SBC and Verizon commenced collecting dial-around compensation on April 15, 1997. The IPTA, numerous PSP commenters, and six state regulatory commissions have taken the position that PSPs are entitled to refunds of any rates charged in excess of the cost-based rates since April 15, 1997. See Petition at 15. The RBOCs, the ICC, and the Massachusetts Department of Telecommunications and Energy have taken the position that no refunds should be granted. Two New York courts have taken opposite positions. See Petition at 16. Despite this overwhelming record, the RBOCs and the ICC purport to claim that there is no outstanding legal controversy or uncertainty upon which the Commission needs issue a declaratory ruling. The record again clearly contradicts the position taken by the RBOCs and the ICC.

The Petition first and foremost seeks a declaratory ruling from the Commission as to the consequences and remedies available for any ILEC's violation of the Commission's Payphone Orders requiring cost-based rates that satisfy the new services test by April 15, 1997. Petition at 3, 17-18. Contrary to the RBOCs and ICC's claim that the Petition is specific and unique to Illinois, the fundamental ruling requested is for the Commission to address what remedies are available to PSPs generally for violations to the Commission's Payphone Orders. To claim that there is no controversy or uncertainty among the states regarding this issue defies credibility.

The Petition further places this generic request in the hard context of the specific facts established through the IPTA proceedings before the ICC and requests the Commission to apply the remedies in the context of that factual record. The Illinois proceedings identify an outstanding controversy and a concrete example of the uncertainty as to the remedies for implementing the Commission's orders. The regulatory proceedings cited in the Petition, and the comments by the various PSPs, clearly establish the magnitude of the controversy, as do the RBOCs and ICC's own opposition.

This Commission emphasized time and again not only the requirement to have cost-based rates in effect no later than April 15, 1997, but also the seriousness with which it would enforce these requirements, even to the extent of denying violators eligibility for receipt of dial-around compensation. The instant case squarely places before the Commission violations of the Commission's orders for the implementation of cost-based rates and for the eligibility for dial-around compensation. These violations are repeated in state after state. The Petition requests the implementation and enforcement of the same federal rights and Commission orders in a consistent and reasonable manner. The lack of agreement, and certain states' lack of enforcement, demands the Commission's attention to uphold the credibility and enforcement of its own rulings.

II. THE FILED RATE DOCTRINE DOES NOT PREVENT THE REFUND OF EXCESS CHARGES.

Both the RBOCs and the ICC seek to avoid enforcement of the Commission's requirement for cost-based rates effective April 15, 1997 on the theory that it would constitute retroactive rate making in violation of the filed rate doctrine. However, similar to how they avoided the expressed language of the Commission's orders, both commentators avoided addressing the express language of the United States Supreme Court in defining the doctrine. The RBOCs rely upon *Arizona Grocery Company,v. Atkinson, T. .& S.F.Ry Co.*, 284 U.S. 370, 52 S.Ct. 183 (1932), and *Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.,* 2 Ill.2d. 205117 N.E. 2d. 774 (1954). RBOC Comments at 15. The ICC relies upon *Independent Voters of Illinois, v. Illinois Commerce Commission*, 117 Ill. 2d. 90, 510 N.E. 2d. 850 (1987), which again relies upon *Mandel Bros., Inc.* ICC Comments at 9. The filed rate doctrine in Illinois is fundamentally the same as that pronounced by the United States Supreme Court, as the Illinois Supreme Court relied upon *Arizona Grocery* in its formulation. *Mandel Bros.,* 2 Ill. 2d. at 210, 117 N.E.2d. at 776. As noted in the Petition, and ignored by the RBOCs and ICC, the U. S. Supreme Court distinguished between a rate set by the carrier and allowed to go into effect by the Commission, and a rate set by the Commission prospectively, and later found to be erroneous. The court defined the filed rate doctrine as follows.

….. (T)he statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the legal rates; that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the act thus created the legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate – it was lawful only if it was reasonable. Under section 6, the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparation.

* * *

In passing upon the issue of fact, the function of the Commission was judicial in character; its action affected only the past so far as any remedy of the shipper was concerned, and a judge for the present merely that the rate was then unreasonable; no authority was granted to prescribed rates to be charged in the future…. Since the carrier had complete liberty of action in making the rate, it necessarily followed that upon a finding of unreasonableness an award of reparation should be measured by the excess paid, subject only to statutory limitations of time.

Arizona Grocery Co., 284 U.S. at 384-85 (footnote omitted).

The Supreme Court distinguished between reviewing rates set by the carriers and those rates that were explicitly approved after hearing and ordered prospectively by the Commission. In the later case, the rates had a legislative quality that bound the carrier and therefore did not make it subject to reparations. The Supreme Court went on to describe that where the Commission fixes the rate the carrier can charge it acts in a legislative capacity.

When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature, and its pronouncement has the force of a statute.

* * *

Specific rates prescribed for the future take the place of the legal tariffed rates theretofore enforced by the voluntary action of the carriers, and themselves become the legal rate. As to such rates, there is no difference between the legal or published tariffed rate and the lawful rate. The carrier cannot charge a rate so prescribed and takes its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save at new hearing in fixing a more adequate rate for the future. It can not have reparation from the shippers for rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasilegislative capacity.

Arizona Grocery Co., 284 U.S. 386-88.

The Supreme Court went on to note that the regulatory commission operates in a dual capacity with different effects.

As respects a rate made by the carrier, its adjudication finds the facts, and may involve a liability to pay reparation. The Commission may, and often does, in the same proceeding, and in a single report and order, exercise its additional authority by fixing rates or rate limits for the future.

* * *

…. (W)hen it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that, when it was sitting to award reparation, it was sitting for a purpose judicial in its nature.

* * *

…. (T)he great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Arizona Grocery Co., 284 U.S. at 388-90

The Supreme Court reaffirmed this specific analysis in *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 128-29, 110 S.Ct. 2759, 2767, citing same holding as *Arizona Grocery, supra.* The Supreme Court reiterated that the filed rate doctrine has the important caveat that the filed rate is not enforceable if the Commission finds it to be unreasonable. *Maislin*

Ind., 497 U.S. at 129. Distinguishing between the tariff rate being the legal rate, but being lawful only if reasonable, is derived directly from the Supreme Court's delineation of the filed rate doctrine. Contrary to the ICC's comments, the IPTA does not seek to obfuscate the matter by recognizing a distinction between legal rates and lawful rates. ICC Comments at 12. Rather the IPTA seeks implementation and enforcement of the filed rate doctrine as designed and implemented by the U.S. Supreme Court.

Similarly, the Supreme Court's own language rebuts the RBOCs' claims that there is no support for the IPTA's position. The RBOCs statement that an agency determination that an existing rate is unreasonable may be applied perspective only does not reflect the filed rate doctrine and has been rejected by the United States Supreme Court. *Arizona Grocery Co.,; Maislin Industries.* Both the RBOCs and the ICC rely upon a 1995 order by the ICC establishing SBC's rates to payphone providers under Illinois state law as it existed in 1995. A Verizon references its rates effective from its general rate case in 1993. However, both avoid any response to the uncontested fact that the Commission required cost-based rates to be effective April 15, 1997 and preempted any state regulation inconsistent thereto. The Commission specifically found pursuant to Section 276(c), that any inconsistency requirements regarding cost-based rates are specifically preempted. *First Report and Order,* ¶ 147. Therefore, as of April 15, 1997, neither SBC nor Verizon was under any ICC or other requirement for rates to PSPs other than the Commission's requirement that they be cost-based rates in compliance with the new services test. The rates adopted by SBC and Verizon for this purpose were set solely at their own discretion. The ICC did not set the rates for either party for compliance with Section 276 or the Commission's orders. Upon its initial investigation of the SBC and Verizon tariffed rates, the ICC found that neither carrier's rates were cost-based or compliant with the new services test. As such, SBC and Verizon were in violation of the Commission's orders and charged unreasonable rates in violation of federal law. Where a carrier-set rates are found to be unreasonable, an award of reparation should be issued measured by the excess paid. *Arizona Bakery; Maislan Industry.* Any contrary determination would effectively render carrier's immune from Commission Orders. Carriers could gain the system by setting rates in violation of their legal requirement for what the RBOCs claim could be years of regulatory investigation (RBOC Comments at 20) reaping excess rates without any remedies. Under the United Supreme Court or state law permits such abuse.

III. VERIZON'S VIOLATION OF THE COMMISSION'S ORDERS FROM APRIL 15, 1997 THROUGH JANUARY 31, 2002 ARE SUBJECT TO REPARATIONS.

Neither the RBOCs nor the ICC contest that the Commission had jurisdiction over the matter of Verizon's receipt of dial-around compensation under Section 276(b)(1)(A). Neither challenges this jurisdiction nor denies the Commission's authority toward Verizon any dial-around compensation under any circumstances. Implicitly conceding the Commission's jurisdiction over Verizon's dial-around compensation under Section 276(b)(1)(A), neither commentator contests that the Commission required Verizon's provision of cost-based rates as a condition precedent to be eligible for receipt of the dial-around compensation granted under that subsection of the Federal Act. Nor, does either commentator claim that that precondition was challenged or reversed during Verizon's collection of dial-around compensation from April 15, 1997 through January 31, 2002. As such, during that time period, this requirement was binding on Verizon to be eligible for dial-around compensation. Verizon violated that precondition for eligibility through rates that did not comply with the new services test, as found by the ICC's Order.

Lacking a response, the RBOCs and ICC both avoid the issue through deliberately vague references to the Commission's lack of authority to require Verizon to provide cost-based rates under Section 276(b)(1)(C). The *Wisconsin Order,* affirmed by *New England Public Communications Council v. FCC,* 334 F.3d. 69(D.C. Cir. 2003), established that the Commission could not directly order Verizon, in Illinois, to provide cost-based rates under Section 276(b)(1)(C), but did not address the Commission's jurisdiction over Verizon's dial-around compensation or right to set preconditions. Verizon was bound by those conditions for eligibility during the above stated time period. Yet, it is again uncontested that Verizon collected dial-around compensation while the preconditions existed and therefore was bound to satisfy those preconditions. It is also beyond per adventure that Verizon did not satisfy those conditions. Since Verizon has collected dial around compensation for the given time period, controversy and uncertainty exist as to Verizon's liability to the PSPs for cost-based rates during the same time period. Given the emphatic orders by the Commission, the IPTA respectfully submits that Verizon is required to make reparations to the PSPs in the amount Verizon's rates exceeded cost-based rates that comply with the new services test.

IV. THE RBOCS AND ICC COLLATERAL ARGUMENTS DO NOT SUPPORT NONENFORCEMENT OF THE COMMISSION'S ORDERS.

Given the Commission's explicit orders and the clear violations by SBC and Verizon, the RBOCs and ICC devote their attention to raising collateral issues to avoid enforcement of the Commission's Orders. These collateral arguments are a mix of claims both internally inconsistent and unsupportive of their position that the Commission's orders should not be enforced. The ICC submits that the IPTA members received "discounted" rates below those required by law for two years. ICC Comments at 3, 15. In 1995, the IPTA and SBC entered into a stipulation settling a complaint that SBC rates and services to IPTA members were in violation of the Illinois Public Utilities Act. Neither the Public Utilities Act, the stipulation, nor the ICC Order required SBC to provide cost-based rates to IPTA members. Rather they involved an ongoing dispute regarding SBC's legal requirements under the state law as it existed in 1995. The orders specifically found that the rates would be subject to future changes in regulatory requirements. The ICC statement that the SBC rates were less than the law required is inconsistent with the fact that the order could only require SBC to provide legal rates. The ICC's position is even more confusing given that the ICC found that SBC had been charging IPTA members rates in excess of the legally required rates under the Commission's orders for over 6 years. The ICC does not explain how the equities would lie with SBC for charging illegally excessive rates for 6 years.

The ICC further comments that the application of cost-based rates was unclear and that there was no evidence that SBC operated in bad faith. ICC Comments at 15-16. However, the ICC does not explain how this militates against enforcement of the PSPs' rights to having cost-based rates. Although the IPTA would take issue with the claim that neither SBC nor Verizon operated in bad faith, the fundamental point is that, at best, this may be applicable to whether punitive measures should be employed as to the Commission's enforcement of its orders or that neither was eligible for dial-around compensation. However, requiring refunds does not amount to a penalty. It merely requires the return of revenues to which neither SBC nor Verizon was entitled in the first place. Even should the Commission agree with the ICC's claim, this may militate against disgorging SBC and Verizon of the dial-around compensation collected beginning April 15, 1997, provided they refund the excess charges to effectively be in compliance with providing cost-based rates back to April 15, 1997. However, it does not entitle either carrier to excess charges illegally obtained at the PSPs' expense through direct violations of the Commission's orders.

Verizon and the ICC both allege that the Commission's orders should be avoided due to a purported lack of diligence by the IPTA in pursuing enforcement. This claim is both unsupported and unjustified. The Commission required cost-based rates effective April 15, 1997. The IPTA petitioned the ICC to investigate both carrier's rates, among others, on May 8, 1997, less than a month after the cost-based rates were ordered to be effective, and eleven days before expiration of the extension granted in the *Bureau Waiver Order*. Throughout the proceedings, all parties requested and agreed to various extensions of time of various deadlines and dates. Numerous dockets were proceeding simultaneously involving the same counsel and witnesses over a variety of issues surrounding this and similar matters arising from the Telecommunications Act of 1996. The parties having failed to object to the extensions at the time cannot after the fact raise objections thereto in an attempt to avoid the reach of the proceedings.

SBC and Verizon further omit that they were responsible for a two year delay in the final determination. After the conclusion of the hearings and the filing of the initial briefs, the carriers requested and were granted a new round of hearings to address a second time the cost-basis of the rates subsequent to the Commission's *Wisconsin Order*. Yet the matter addressed by the Commission had been fully raised, testified to, and briefed in the initial hearings. This Commission's *Wisconsin Order* confirmed the IPTA's position. SBC and Verizon advised and took a second bite at the apple and retried the case, extending the matter from January, 2002 through November, 2003 to address the very same position established by the IPTA in the initial round of hearings.

The IPTA pursued its rights from the outset of this Commission's orders. It tried the matter twice before the ICC. It is expended enormous amount of capital and resources to effect an enforce its rights as found by this Commission and subsequently sustained by the ICC. The equities do not lie in favor of non-enforcement of the Commission's orders. Nor can any prejudice be shown to the LECs. SBC and Verizon collected hundreds of millions of dollars in dial-around compensation for 6 years and 5 years, respectively, without complying with the Commission's orders. The excess charges amount to approximately $10 to $20 million dollars, a pittance in comparison to the benefits reaped by SBC and Verizon should they comply with the conditions precedent. The equities are clearly one sided in favor or the IPTA and PSPs who seek only enforcement of the Commission's orders about which the Commission claimed to be emphatic.

Nor is there any support for the RBOCs' claim that the IPTA members failed to complain to the ICC seeking refunds. From the outset, the IPTA petitioned the ICC for an investigation of SBC and Verizon rates was filed on behalf of the members of the IPTA and specifically requested a refund to its members of any charges in excess of the cost-based rates required under Section 276. See Attachment A: IPTA Petition in ICC Docket No. 97-0225. The demand for refunds was submitted in the testimony of the parties and fully briefed by all parties throughout every stage of the proceedings. The record will not support the RBOCs allegation did not formally challenge the rates or seek a refund.

V. THE IPTA SPECIFICALLY ADDRESSED THE COMMISSION'S ORDERS REQUIRING ENFORCEMENT OF COST-BASED RATES FOR SBC AND VERIZON TO BE ELIGIBLE FOR DIAL-AROUND COMPENSATION.

Both the RBOCs and the ICC seek to avoid enforcement of the Commission's orders, that SBC and Verizon provide cost-based rates to PSPs to be eligible to receive dial-around compensation. The RBOCs claim that the IPTA members lack standing to raise this issue that they did not pay the dial-around compensation and therefore have no distinct palpable injury to redress. The ICC claims that this matter was never presented to the ICC and is irrelevant to the PSPs request for enforcement. Neither position is supported by the record.

As noted in the Petition, the Commission specifically imposed the requirement of cost-based rates for eligibility to receive dial-around compensation for the benefit of enforcing the PSPs' rights under Section 276. This precondition for eligibility for dial-around compensation was not based upon any right of an IXC to be free of any requirement to make payment of dial-around compensation for a call originating from a payphone. The precondition was expressly and solely imposed by the Commission for the benefit of enforcing the PSPs' rights as found by the Commission including the right for cost-based rates. This precondition was expressly and solely to "ensure that LECs comply with the requirements we set forth in the Report and Order". Petition at 10.

It was not the IXCs' rights the Commission sought to protect nor the IXCs that would be injured for violation of these requirements. Rather, the Commission expressly recognized that the LECs would have an incentive to charge excessive rates to their PSP competitors. *First Payphone Order,* ¶ 146. Therefore, the Commission explicitly imposed these preconditions as a means of enforcing those requirements to ensure that the PSPs' rights would be implemented. *Payphone Reconsideration Order,* ¶131. In contrast to the RBOCs' claims that enforcement of the preconditions for eligibility of dial-around compensation is only for "harassment" (RBOC Comments at 18), it is doubtful that that is the purpose for which the Commission imposed this requirement. The PSPs have a direct interest in enforcement of the very enforcement procedures adopted by the Commission for the protection of the PSPs' rights. Complete avoidance of this enforcement scheme by the Commission only confirms the impunity by which SBC and Verizon may ignore the Commission orders as ineffective and unenforceable.

The ICC's claim that this matter was not raised before the ICC is similarly without merit. After the ICC determined that SBC and Verizon rates were not cost-based but denied refunds to PSPs for the excessive charges, the IPTA expressly identified not only the need for refunds but that the failure to make the cost-based rates effective as of April 15, 1997 would render SBC and Verizon ineligible for receipt of dial-around compensation for the time period the cost-based rates were not effective. See Attachment B: IPTA Petition for Rehearing. It was the Commission's regulatory design for the protection of the PSPs that the PSPs must receive cost-based rates for SBC and Verizon to be eligible for the dial-around compensation. In exchange for the hundreds of millions of dollars in dial-around compensation received by SBC and Verizon, they were required not to impose $10 to 20 million dollars in charges in excess of cost-based rates compliant with the new services test. The Commission's regulatory bargain was an exceptionally fair and lucrative bargain for SBC and Verizon. The only matter more ludicrous than their complaint as to the fairness of this structure is their attempt to take their hundreds of millions of dollars in compensation while denying a refund of the $10 to 20 million dollars in unwarranted excess charges imposed on the PSPs.

CONCLUSION

WHEREFORE, the reasons stated in the Petition and above, the Illinois Public Telecommunications Association respectively requests that the Commission grant its Petition for Declaratory Ruling.

/s/

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September 7, 2004

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
Of the Telecommunications Act of 1996	)	
The Illinois Public Telecommunications Association's,	)	
Petition for A Declaratory Ruling Regarding the Remedies	)	
Available for Violations of the Commission's Payphone	)	
Orders	)	

REPLY COMMENTS OF THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION ON THE IPTA PETITION FOR DECLARATORY RULING

ATTACHMENT A: IPTA PETITION in ICC DOCKET NO. 97-0225

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION, an Illinois not for profit corporation,	))))	97-0225
Petition to Determine Whether Illinois Local Exchange Carriers Are In Compliance With The Illinois Public Utilities Act and Section 276 of The Communications Act of 1934.	)))))	

PETITION

The Illinois Public Telecommunications Association, by its attorneys O'Keefe, Ashenden, Lyons and Ward, pursuant to Section 276 of the Federal Communications Act of 1934, 47 U.S.C. §276, hereby petitions the Illinois Commerce Commission, to initiate an investigation to determine whether Illinois Local Exchange Carriers' tariffs for payphone exchange services comply with requirements of Section 276 of the Communications Act of 1934, 47 U.S.C. §276 (hereinafter the "FCA"), the Federal Communications Commissions orders in CC Docket No. 96-128[1], and Sections 13-505.1, 13-505.2, 13-505.3, and 13-505.4 of the Illinois Public Utilities Act (hereinafter the "IPUA"), 220 ILCS 5/13-505.1 - 13-505.4.

The Illinois Public Telecommunications Association further requests that the Commission investigate whether local exchange carriers, with the exception of Ameritech, have complied with the FCA's mandate that each LEC's payphone operations not be subsidized with

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[1], *In the Matter of the Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, FCC 96-388 (released September 20, 1996) ("Payphone Order"); Order on Reconsideration, FCC 96-439 (released November 8, 1996) ("Order on Reconsideration"); Order, FCC 97-678 (Com. Car. Bur. released April 4, 1997) ("Bureau Waiver Order"); Order, FCC 97-805 (released April 15, 1997) ("Clarification Order").

revenue from noncompetitive exchange services or exchange access services. (47 U.S.C. § 276(a)(1)).[2] The IPTA states as follows in support of its Petition.

1. The Illinois Public Telecommunications Association (the "IPTA") is a not-for-profit corporation organized and existing under the laws of the State of Illinois. The IPTA has its principal place of business located at 314 N. McHenry Road, Buffalo Grove, Illinois. The IPTA is an association of companies that provide pay telephone services in the State of Illinois. Most of the members of the IPTA are certified as telecommunications carriers under Section 13-202 of the Illinois Public Utilities Act, 220 ILCS 5/13-202.

2. In February, 1996 President Clinton enacted the Telecommunications Act of 1996. Section 276 of that Act states in relevant part:

> (a) NONDISCRIMINATION SAFEGUARDS.--After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service--
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> (1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and
>
> (2) shall not prefer or discriminate in favor of its payphone service.
>
> (b) REGULATIONS.--

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[2] Ameritech would likely be excused from this portion of the proceeding in light of the Commission's Order identifying and removing the noncompetitive subsidies in ICC Docket No. 88-0412. *Independent Coin Payphone Association v. Illinois Bell Telephone Company*, ICC Docket No. 88-0412 (Order June 5, 1995.) In this Order, the Commission held that Ameritech's competitive payphone operations were being annually subsidized with $27 million from noncompetitive services. The Commission restructured Ameritech's payphone operations to correct the cross-subsidy.

> (1) CONTENTS OF REGULATIONS.--In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--
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> * * *
>
> (B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues . . . .;
>
> (C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;
>
> * * *
>
> (E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

47 U.S.C. §276. (The full text of Section 276 is attached hereto as Exhibit A.)

3. Pursuant to Section 276(b) of the FCA, the Federal Communications Commission ("FCC") initiated an investigation to determine what regulations it would develop to implement Section 276. Beginning with its Payphone Order, the FCC issued several orders adopting regulations and procedures implementing Section 276 of the FCA.

4. The FCC held that several issues relating to the implementation of §276 would be the responsibility of state public service commissions. One such issue which has been delegated

to states is whether network services provided to payphone providers by local exchange carriers ("LECs") are in compliance with the requirements of Section 276:

> We require LECs to file tariffs for the basic payphone services and unbundled functionalities in the intrastate and interstate jurisdictions as discussed below. LECs must file intrastate tariffs for these payphone services and any unbundled features they provide to their own payphone services. **The tariffs for these LEC payphone services must be: (1) cost based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the Computer III guidelines for tariffing such intrastate services.** [fn.] .... **We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276.** ... Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the *Report and Order*, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the *Report and Order* as revised herein; and 2) that in such case no further filings are required.

Order on Reconsideration, ¶163 [emphasis added]; *See also Clarification Order* at ¶11. The FCC vested the Illinois Commerce Commission with the obligation to investigate whether LEC access services are nondiscriminatory, cost-based, and are not being used to subsidize LEC payphone operations.

5. The FCC held that the Illinois Commerce Commission must determine whether LEC network services satisfy the New Services Test methodology for determining the rates at which payphone providers would purchase or impute (under Section 13-505.1 of the IPUA) network services. (*See e.g. Order on Reconsideration*, at ¶163, n. 492). Recently, the FCC further held:

> Tariffs for payphone services, including unbundled features and functions filed with the states, pursuant to the Payphone Reclassification Proceeding, must be cost-based, consistent with Section 276, nondiscriminatory, and consistent with Computer III tariffing guidelines.

(*Bureau Waiver Order*, at ¶2; *See also, Clarification Order*, at ¶10.) The FCC reiterated that intrastate tariffs are subject to the "New Services Test" as the method to assure that rates are cost-based. (*Bureau Waiver Order*, fn. 5.) The New Services Test is intended to establish a price ceiling for noncompetitive payphone services, and is codified at 47 C.F.R. §61.49(g)(2). (A copy of §61.49(g)(2) is attached hereto as Exhibit B.)

6. The FCC also held that the Illinois Commerce Commission must determine whether each LEC has removed any subsidies flowing from the noncompetitive ratepayers' basic exchange service revenue to the LECs' competitive payphone services. (*Order*, at ¶180-187.) Recently, the FCC held:

> In addition, the Payphone Reclassification Proceeding required states to ensure that payphone costs from unregulated equipment and subsidies are removed from intrastate local exchange service and exchange access service rates.

(*Bureau Waiver Order*, at ¶2; *See also, Clarification Order*, at ¶10.)

7. The FCC's mandate that LEC's restructure their operations to provide nondiscriminatory cost-based rates for noncompetitive services, and that the LECs' competitive payphone operations not be subsidized with revenue from noncompetitive ratepayers, is consistent with the requirements imposed on LECs by the IPUA.

8. The Illinois Commerce Commission has held that payphone services provided to end users through the deposit of coins is a competitive service in Illinois. (220 ILCS 5/13-209; ICC Docket No. 84-0442; ICC Docket No. 88-0412.)

9. Like Section 276 of the FCA, the IPUA requires LECs to 1) not subsidize their competitive payphone services with revenue from noncompetitive services; and 2) not discriminate in favor of its competitive payphone services in the provision of noncompetitive

services. (§13-507; §13-505.1; §13-505.2; §13-505.3; §13-505.4.)

10. At the time the Commission investigates whether Illinois LECs comply with Section 276 of the FCA and the FCC Orders adopted pursuant to the FCA, the Commission must also investigate whether LECs comply with the applicable requirements under the Illinois Public Utilities Act, including those sections which prohibit discrimination in the provision of noncompetitive services, and those sections which prohibit subsidization of competitive payphone services with revenue from noncompetitive services.

11. The FCC's orders require LECs to provide nondiscriminatory COPT services, as well as nondiscriminatory coin line services which have traditionally been used by local exchange carriers. All the LECs are currently offering coin line services which would violate the IPUA. For example, the LECs have proposed a coin line service which requires any telecommunications carrier to adopt, for its own end user customers, the rate tables selected by the LEC payphone division for all intraLATA calls other than the initial coin drop. Under the LECs' coin line offering, all competitors using the coin line service must charge the same rates for non-local sent-paid calls that are preprogrammed into the central office by each LEC's own payphone division. Although the initial coin drop used to initiate a local call can be programmed at the phone, the rating for a local call (whether the $0.25 will allow an end user to complete a 3 minute local call, 5 minute local call, or an untimed local call) is preset at the central office according to the LEC payphone rates. There are other examples of how the coin line offered by LECs is discriminatory (*e.g.* the coin line subscriber is required to presubscribe all 0+ and 1+ calls to the intraLATA carrier selected by the LEC's own payphone division.) The Commission should investigate whether the LECs' coin line services are discriminatory.

12. The FCC has mandated that the Illinois Commerce Commission investigate whether each LEC has done the following in compliance with Section 276 of the FCA:

A. Tariffed intrastate payphone services (both COPT and coin line) which are:

1) Cost-based and in compliance with the New Services Test pricing methodology;

2) Consistent with the requirements of Section 276, with regard for example the ability of a payphone provider to presubscribe its intraLATA operator services to the OSP of choice;

3) Nondiscriminatory.

B. Provided evidence of record that the payphone operations are not being subsidized with revenue from either basic exchange service or exchange access services.

13. Whether Illinois LECs are in compliance with Section 276 of the FCA and the IPUA, is an issue that has significant effect on the consumers of payphone services as well as consumers of LEC noncompetitive services. In order to foster the widespread availability of payphone services at the lowest price, it is imperative to follow through on the FCC's directive that network services be nondiscriminatory and provided to payphone providers at a cost-based price. In addition, to maintain low rates for noncompetitive services, the Commission must investigate LEC payphone operations to assure that noncompetitive ratepayers are not subsidizing competitive payphone operations.

14. In order to fully investigate these issues, the IPTA requests that the Illinois Commerce Commission initiate an investigation of each LEC for the purpose of determining whether LEC network services are nondiscriminatory and cost based, and whether LEC payphone operations (with the exception of Ameritech) are being subsidized with revenue from

noncompetitive exchange services.

15. To address the factual issues that necessarily arise in reviewing cost-based pricing of network services, the IPTA request that this matter be treated as a contested case, as defined by the Illinois Administrative Code, and conduct evidentiary hearings. 83 Ill.Adm.Code 200.40

16. The IPTA notes that the FCC has ordered that any reduction in the rates for network services priced under the New Services Test would result in refunds to payphone providers dating back to April 15, 1997, the original date by which all LECs were to have provided network services at cost-based rates. *Clarification Order*, at ¶2.

Wherefore, for each of the foregoing reason, the Illinois Public Telecommunications Association respectfully requests that the Illinois Commerce Commission initiate an investigation naming each local exchange carrier in Illinois as a party to this proceeding, and conduct hearings:

A. To determine the cost basis for each network service provided by Illinois local exchange carriers to payphone providers, and specifically the cost under the New Services Test required by Section 276 of the FCA and the Federal Communications Commission;

B. To establish the cost-based price for each network service provided by Illinois local exchange carriers to payphone providers under the New Services Test;

C. To determine whether the network services provided by Illinois LECs to payphone providers discriminate in favor of the LEC's own payphone operations;

D. To determine whether Illinois LECs are subsidizing their payphone operations with revenue from noncompetitive services; and,

E. To determine the amount of refunds, if any, which are due to payphone providers who purchased network services from LECs who failed to comply with the FCC's mandate that network services be provided at cost-based rates.

Respectfully submitted,

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION

Dated: May 6, 1997

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EXHIBIT A

SEC. 276. [47 U.S.C. 276] PROVISION OF PAYPHONE SERVICE.

(a) NONDISCRIMINATION SAFEGUARDS.--After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) REGULATIONS.--

(1) CONTENTS OF REGULATIONS.--In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) PUBLIC INTEREST TELEPHONES.--In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) EXISTING CONTRACTS.--Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.

(c) STATE PREEMPTION.--To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) DEFINITION.--As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

EXHIBIT B

47 C.F.R. § 61.49 - Definition of the New Services Test.

Section 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

(a) Each price cap tariff filing must be accompanied by supporting materials sufficient to calculate required adjustments to each PCI, API, and SBI pursuant to the methodologies provided in §§ 61.44, 61.45, 61.46, and 61.47, as applicable.

(b) Each price cap tariff filing that proposes rates that are within applicable bands established pursuant to § 61.47, and that results in an API value that is equal to or less than the applicable PCI value, must be accompanied by supporting materials sufficient to establish compliance with the applicable bands, and to calculate the necessary adjustment to the affected APIs and SBIs pursuant to §§ 61.46 and 61.47, respectively.

(c) Each price cap tariff filing that proposes rates above the applicable band limits established in §§ 61.47 (e), (f)(1), (g) and (h), or above the limit on composite average residential rates established in § 61.47(f)(2), must be accompanied by supporting materials establishing substantial cause for the proposed rates.

(d) Each price cap filing that proposes service category rates below applicable band limits established in § 61.47(e), (g) and (h) of this part, must be accompanied by supporting materials establishing that the rates cover the service category's average variable cost, or equivalently, that the service category's net additional revenue resulting from the price change exceeds additional costs.

(e) Each price cap tariff filing that proposes rates that will result in an API value that exceeds the applicable PCI value must be accompanied by: (1) An explanation of the manner in which all costs have been allocated among baskets; and (2) within the affected basket, a cost assignment slowing down to the lowest possible level of disaggregation, including a detailed explanation of the reasons for the prices of all rate elements to which costs are not assigned.

(f) Each price cap tariff filing that proposes restructuring of existing rates must be accompanied by supporting materials sufficient to make the adjustments to each affected API and SBI required by §§ 61.46(c) and 61.47(d), respectively.

(g) (1) Each tariff filing by a dominant interexchange carrier, as specified by Commission order, that introduces a new service that will later be included in a basket must be accompanied by cost data sufficient to establish that the new service, and each unbundled element thereof, will generate a net revenue increase--measured against revenues generated from all services subject to price cap regulation, and calculated based upon present value--within the lesser of a 24-month period after an annual price cap tariff including the new service takes effect, or 36 months from the date the new service becomes effective. Each carrier making such a tariff filing must, at the time the new service is incorporated into the price cap index, submit data sufficient to make the API and PCI calculations required by §§ 61.46(b) and 61.44(c) of this part, and, as necessary, to make the SBI calculations provided in § 61.47 (b) or (c) of this part.

(2) Each tariff filing submitted by a local exchange carrier specified in § 61.41(a) (2) or (3) of this part that introduces a new service or a restructured unbundled basic service element (BSE) (as BSE is defined in § 69.2 (mm)) that is or will later be included in a basket must be accompanied by cost data sufficient to establish that the new service or unbundled BSE will not recover more than a reasonable portion of the carrier's overhead costs.

(h) Each tariff filing by a local exchange carrier subject to price cap regulation that introduces a new service or a restructured unbundled basis service element (BSE), as defined in § 69.2(mm) of this chapter, that is or will later be included in a basket, or that introduces or changes the rates for connection charge subelements for expanded interconnection, as defined in § 69.121 of this chapter, must also be accompanied by:

(1) The following, including complete explanations of the bases for the estimates.

(i) A study containing a projection of costs for a representative 12 month period; and

(ii) Estimates of the effect of the new tariff on the traffic and revenues from the service to which the new tariff applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in paragraph (h)(1)(i) of this section.

(2) Working papers and statistical data.

(i) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the Chief, Tariff Review Branch must be provided two sets of working papers containing the information underlying the data supplied in response to paragraph (h)(1) of this section, and a clear explanation of how the working papers relate to that information.

(ii) All statistical studies must be submitted and supported in the form prescribed in § 1.363 of the Commission's rules.

(i) Each tariff filing submitted by a local exchange carrier subject to price cap regulation that introduces or changes the rates for connection charge subelements for expanded interconnection, as defined in § 69.121 of this chapter, must be accompanied by cost data sufficient to establish that such charges will not recover more than a just and reasonable portion of the carrier's overhead costs.

(j) For a tariff filing that introduces or changes a contribution charge for special access and expanded interconnection, as defined in § 69.122 of this chapter, the carrier must submit information sufficient to establish that the charge has been calculated in a manner that complies with the Commission order authorizing the contribution charge.

(k) For a tariff that introduces a system of density pricing zones, as described in § 69.123 of this chapter, the carrier must, before filing its tariff, submit a density pricing zone plan including, inter alia, documentation sufficient to establish that the system of zones reasonably reflects cost- related characteristics, such as the density of total interstate traffic in central offices located in the respective zones, and receive approval of its proposed plan.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
Of the Telecommunications Act of 1996	)	
The Illinois Public Telecommunications Association's,	)	
Petition for A Declaratory Ruling Regarding the Remedies	)	
Available for Violations of the Commission's Payphone	)	
Orders	)	

REPLY COMMENTS OF THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION ON THE IPTA PETITION FOR DECLARATORY RULING

ATTACHMENT B: IPTA PETITION FOR REHEARING

BEFORE THE
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion Investigation Into Certain Payphone Issues as Directed in Docket 97-0225	)))))	Docket 98-0195

THE ILLINOIS PUBLIC TELECOMMUNICATION ASSOCIATION'S APPLICATION FOR REHEARING

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Filed: December 12, 2003

Public Version

BEFORE
THE ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On its Own Motion	)	
	)	Docket 98-0195
Investigation Into Certain Payphone	)	
Issues as Directed in Docket 97-0225	)	

THE ILLINOIS PUBLIC TELECOMMUNICATION ASSOCIATION'S APPLICATION FOR REHEARING

The Illinois Public Telecommunications Association ("IPTA"), by its attorneys and pursuant to Section 200.880 of the Commission's rules of practice, 83 Ill.Adm.Code 200.880, hereby files this Application for Rehearing of the Commission's November 12, 2003 Order ("Order") in this proceeding.

The road to the Order adopted by the Commission has been long as this proceeding started more than six years ago. The IPTA submits that the analysis and conclusions reached in the Commission's Order are generally correct in interpreting and applying the requirements imposed upon this Commission in the *FCC's Payphone Orders*.[1] The Commission correctly held that Section 276 of the Federal Telecommunications Act and the *FCC Payphone Orders* require that payphone access services be set at cost-based rates pursuant to the New Services Test. Order, at p. 20. The Commission further held that neither Illinois Bell Telephone

[1] *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*Payphone Order*"); Order on Reconsideration, FCC 96-439 (released November 8, 1996) ("*Order on Reconsideration*"), aff'd in part and remanded in part, sub nom. *Illinois Public Telecommunications Assn. v. FCC and United States*, Case No. 96-134 (D.C. Cir. July 1, 1997); Order, DA 97-678 (Com. Car. Bur. Released April 4, 1997) ("*Bureau Waiver Order*"); Order, DA 97-805 (released April 15, 1997) ("*Payphone Clarification Order*"); Second Report and Order, 13 FCC Rcd 1778 (1997) ("*Second Report and Order*"). The FCC's decisions in CC Docket No. 96-128 are together referred to herein as the "*FCC's Payphone Orders*."

Company (now SBC Illinois) nor GTE North, Inc. (now Verizon) complied with that cost-based pricing standard. Order, at pp. 34-37. With the exception of the points raised herein, the IPTA supports and commends the Commission for these determinations.

The primary error of the Commission's Order is that the Commission fails to enforce the legal requirements for SBC's and Verizon's six years of shameful and utter disregard for the regulations of this Commission and the FCC. It is without question that the ICC's regulations mandate that all Illinois local exchange carriers must set their payphone access rates according to the New Services Test. *See*, 83 Ill. Admin. Code Part 771.600. It is without question that the FCC set a compliance deadline that cost based rates be effective as of April 15, 1997. Verizon and SBC each filed a sworn affidavit with this Commission in May, 1997 attesting that its network rates for payphone services were in compliance with the New Services Test. This compliance was a condition precedent to each carrier being eligible to receive dial around compensation for calls originating on their payphones. As a result of their purported compliance with the New Services Test, and on reliance of the truthfulness of their affidavits, SBC and Verizon have received hundreds of millions of dollars in dial around compensation for SBC and Verizon payphones in return for providing payphone service providers with cost based rates for network services.

However, as this Commission has held, those network rates were not cost based rates as required under the New Services Test, the *FCC Payphone Orders*, and Part 771.600. Due to SBC's and Verizon's unlawful and excessive rates set in violation of both state and federal law, both incumbents have been reaping the financial reward for purported compliance since 1997, while simultaneously and anticompetitively gorging the Independent Payphone Providers ("IPPs") on network service rates. In contrast to the orders of the FCC, other state commissions and courts, the instant Order fails to enforce the cost based rate requirement on SBC and Verizon for their unlawful activities for which they have received their benefit of the dial around compensation bargain for more than six years. The Commission must rehear this conclusion and require that whole and complete refunds be paid to the independent payphone providers immediately to place the payphone service providers in the position they were legally entitled in return for the dial around compensation paid to SBC and Verizon since April, 1997.

I. REHEARING ISSUE NUMBER 1.

THE COMMISSION IS NOT VESTED WITH THE AUTHORITY TO WAIVE THE FEDERAL REQUIREMENT THAT SBC AND VERIZON ARE REQUIRED TO HAVE COST BASED PAYPHONE ACCESS RATES EFFECTIVE NO LATER THAN APRIL 15, 1997.

The Order rightly finds that neither SBC's nor Verizon's May, 1997 compliance filings, nor their current tariff rates, comply with cost based rate requirement of the New Services Test. Order, at pp. 33-35. The Commission adopted the formula proposed by the IPTA to develop the appropriate cost-based rates under the New Services Test, but has not specifically listed the actual cost based rates the Commission has adopted. The IPTA requests the Commission to do so to avoid any confusion or further delay in implementing the obligations of SBC and Verizon. The IPTA provided the appropriate rates consistent with the Order's finding in the IPTA's Initial Brief on Reopening, at pages 46-47 for SBC and pages 59-61 for Verizon, which are attached as Appendix A and incorporated herein by reference.

The adoption of the IPTA's proposed formula and payphone access service rates match the Order's findings and will satisfy the New Services Test on a going-forward basis. However, the new rates alone do not address that the Complainants have been forced to pay unlawful, excessive rates for more than 6 years, while SBC and Verizon not only received legally excessive charges, but also collected hundreds of millions of dollars in dial around compensation revenues solely on the basis of satisfying the condition precedent of being in compliance with the New Services Test since April 15, 1997. The instant Order arises from the petition timely filed by the IPTA on May 8, 1997 for compliance with Section 276 [2] and entitles the payphone service providers to enforcement of their rights under federal and state law. Failure to order refunds not only improperly rewards SBC and Verizon for their violations of both federal and state law, but denies payphone service providers the reparations to which they are entitled. The Commission's Order fails to enforce the FCC requirement that the local exchange carriers must provide cost based rates to payphone service providers effective no later than April 15, 1997.

Ordering refunds is mandated by FCC's *Payphone Orders* and is consistent with numerous other decisions reached by the FCC and state commission implementing the New Services Test. Further, this Commission's Order imposing rates on a going-forward basis, but failure to order refunds for the unlawful rates assessed since April 15, 1997, effectively constitutes an unauthorized waiver of the *FCC's Payphone Orders*. Such a decision is inconsistent with federal law and is preempted.

A. This Commission is not vested with the authority to waive the requirement under federal law that the LECs must have rates in effect as of April 15, 1997 that comply with the New Services Test.

The Order's finding that refunds are not appropriate makes a nullity out of the requirements of the New Services Test and the *FCC's Payphone Orders* mandating its application. Under the New Services Test, the LECs had an affirmative duty under ***federal*** law to implement tariffs to cost-based rates, and to recover no more than a reasonable overhead allocation, effective as of April 15, 1997. Payphone service providers petitioned this

[2] See ICC Docket No. 97-0225, Final Order (December 17, 1997), and the Initiating Order of the instant proceeding.

Commission through the IPTA on May 8, 1997 for enforcement of those rights. The Commission cannot now, after the LECs failed to comply with that requirement for over six years, find that the LECs have been excused from complying with federal law for this time period. In short, the Commission's order grants the LECs a waiver of the FCC's requirement for compliance no later than April 15, 1997 in direct conflict with the FCC's orders. See *Order on Reconsideration*, par. 163 (LECs are required to have cost based intrastate tariffs "effective no later than April 15, 1997").

As the Commission held elsewhere in the Order, the burden to comply with the New Services Test and the *FCC's Payphone Orders* lies solely on the shoulders of the LECs. See, e.g., Order, at p. 35 ("The record does not support a finding that SBC and Verizon have met their burden with respect to this issue.") This was made explicitly clear in the *FCC's Payphone Orders*, and such a finding is completely consistent with the language of Section 276 and Part 771.600 of the Commission's regulations. It is clear that the duty of ensuring timely compliance with legal obligations does not lie with the IPTA, or even with this Commission, but lies solely with SBC and Verizon.

However, by finding that the IPPs should not receive refunds for the six years they were forced to pay unlawful and excessive rates, the Order has essentially given SBC and Verizon a *de facto* waiver of its obligations to December 12, 2003, in direct conflict with the waiver deadline of April 15, 1997 set by the FCC. In other words, the Order finds that SBC and Verizon were ***not*** obligated to have in effect cost-based rates effective on April 15, 1997 and purports to have that finding take precedence over binding federal law. As discussed below, such a finding is not legally sustainable and grants the LECs immunity for their willful noncompliance with the law.

The Commission is not vested with the authority to excuse the LECs willful noncompliance of their legal obligations under the New Services Test. The Order denies refunds stating "that order would necessarily be contrary to Illinois law and the Supreme Court's holding in *Arizona Grocery*." Order, at p. 43. But Illinois law addresses rates that have been reviewed and approved by the Commission. Only once approved may the carrier rely upon the approval of the Commission in providing service. These cases do not protect the carrier for unlawful tariffs that have simply been filed by the carrier and not subject to an investigation and Commission order approving the rates.

The instant matter before the Commission involves whether SBC's and Verizon's tariffs are in compliance with the *FCC's Payphone Orders* and Part 771.600. The instant tariffs have never been approved as in compliance with these requirements. Any review and approval of these tariffed rates was solely based upon determining compliance with state law prior to the Federal Telecommunications Act of 1996 ("Federal Act") or to Part 771.600. As of April 15, 1997 entirely new obligations rested on the carriers. In this case of first impression the Commission has now determined that SBC and Verizon have not complied. There never was any review and approval of the SBC and Verizon tariffs as to the Federal Act or Part 771.600. The Commission does not have the authority to extend the FCC's deadline of April 15, 1997 for effective compliance under the Federal Act. Such a finding is legally unenforceable.

The FCC addressed this scenario in the *Wisconsin Order* when it stated:

> The preemption provision of section 276(c) comes strongly into play here. That provision preempts "*any* State requirement" that is "inconsistent with the Commission's regulations" implemented pursuant to section 276(b)(1). Nonstructural safeguards implemented under subsection C would, of course, be implemented pursuant to section 276(b)(1) and would fall within the scope of the preemption provision.

Wisconsin Order, ¶ 38 (emphasis in text). The Commission's conclusion that neither SBC nor Verizon were obligated to have cost-based rates effective for their payphone access services as of April 15, 1997 is inconsistent with the *FCC's Payphone Orders* and Section 276. It is improper for the Commission to allow SBC and Verizon to wait for state action rather than to timely comply with federal law. Any order rewarding the LECs for their willful noncompliance of their legal duties based upon an inconsistent state order is expressly forbidden by Section 276. Issuing refunds to account for the cost-based rates dating back to 1997 is the only manner in which cost based rates will be effective as of April 15, 1997 and in which the LECs are not rewarded for their noncompliance of the federal mandates.

B. The FCC Ordered the LECs to provide refunds to IPPs if their rates were found to not comply with the FCC's New Services Test.

The Order holds that "it would be contrary to law for the Commission to hold Verizon to the regulatory bargain struck by certain BOCs and the FCC with regard to the issuance of refunds …" Order, at p. 43. However, this finding is in direct contravention with both the FCC *Limited Waiver Order*, other FCC orders implementing the New Services Test, and the record evidence in this proceeding. It is not a question of a private agreement between certain BOCs and the FCC. The FCC has ordered all LECs to reimburse payphone service providers back to April 15, 1997. Furthermore, the bargain, if one exists, is that SBC and Verizon are required to have effective cost based rates for payphone service providers as a prerequisite for SBC and Verizon to receive dial around compensation for their payphones. SBC and Verizon have been receiving such dial around compensation as their benefit of the bargain that they provide cost based rates effective April 15, 1997. It is up to the Commission to enforce compliance of the condition precedent by ordering refunds of any excess over cost base rates since April 15, 1997.

Under the *FCC's Payphone Orders*, SBC and Verizon were required to have implemented no later than April 15, 1997 tariffs setting forth rates that complied with the New Services Test. By FCC order, to the extent that a tariffed rate is reduced after a state investigation implementing the "New Services Test," LECs are required to refund excessive payments made from April 15, 1997 to the date of implementation:

> Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. . . **A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates.** This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.

FCC Clarification Order, at ¶¶. 1-2.

It cannot be disputed that both SBC and Verizon relied upon the waiver, as they filed their compliance filings on May 19 and 21, 1997, rather than on April 15, 1997. Notwithstanding this fact, the Order finds it inappropriate to apply the refund provision against Verizon because it was not part of the RBOC Coalition at the time. [3]

Also, both SBC and Verizon were required by the FCC to have cost based rates for network services provided to payphone service providers effective as a condition precedent for either to receive dial around compensation on their respective payphones. *Id.; Order on Reconsideration*, pars. 130-32, 161-63; *Second Report and Order*, par. 1, fn 9. As the evidence submitted in this

[3] As both SBC and Ameritech were both members of the RBOC Coalition seeking the requested waiver and were clearly part of the "regulatory bargain" struck with the FCC, the IPTA understands this particular discussion in the Order does not apply to SBC.

proceeding establishes, SBC and Verizon have received hundreds of millions of dollars in dial around compensation since April 15, 1997 on the basis that they had cost based rates effective as of that date. They cannot reap the dial around compensation of over 6 years, awarded expressly conditioned on the basis of compliance with cost based rates, without meeting the condition precedent that the PSPs receive network services per cost based rates.

As the Commission rightly held in the Order, those May, 1997 tariff filings contained rates that are excessive and unlawful under the New Services Test. Verizon and SBC must reimburse those excessive revenues collected from the IPPs dating back to April 15, 1997.

C. Ordering refunds is consistent with other FCC and state commission orders where LECs have been held to price services in violation of the FCC's New Services Test.

It is important to keep in mind when addressing this issue that it is completely in line with FCC precedent to order refunds in those situations where a LEC has overcharged its customer through the imposition of rates that did not comply with the New Services Test requirement. In the *Physical Collocation Tariff Order* [4]cited in the *Wisconsin Order* to establish overhead allocations under the New Services Test, the FCC held that the proper manner to account for overpayments due to non-cost-based rates is to issue a refund equal to the amount of the overcharge.

In the *Physical Collocation Tariff Order*, the FCC found itself reviewing numerous LEC tariff rates, including SBC and Verizon, and found that certain tariffed rates "exceeded those permissible under cost-based [i.e., New Services Test] regulation. . . ." *Physical Collocation Tariff Order*, at ¶ 18. As a result of the LEC's excessive tariffed rates for physical collocation

[4] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730 (June 13, 1997) (*Physical Collocation Tariff Order*).

facilities, the FCC held that the LECs must issue a refund dating back to the date by which the FCC ordered the LECs to offer physical collocation. "We require LECs that provided physical collocation service after December 14, 1994 to refund all overcharges after that date." *Id.*, at 19. Similarly, here the FCC ordered compliance no later than April 15, 1997. Thus, under the same New Services Test at issue in this proceeding, SBC and Verizon must "refund all overcharges after that date."

Also, in the FCC's *LIDB Order*,[5] the FCC applied the New Services Test and held that the LEC's tariffed rates for charges for signaling networks and line information database were in excess of the cost-based requirements of the New Services Test and therefore unjust and unreasonable. *LIDB Order* ¶ 53. Importantly, the FCC specifically held that, under the New Services Test, LECs with excessive rates "are required to issue refunds with simple interest." *LIDB Order* ¶ 13.

Consistent with the FCC orders requiring refunds, numerous other state commissions implementing the New Services Test for payphone services have required refunds of rates that did not meet the cost base requirement.

1. Tennessee Regulatory Authority ("TRA") Docket No. 97-00409 (a copy of which is attached to the IPTA Brief on Exceptions as Exhibit D) – The TRA voted unanimously to require the LECs to pay as reimbursement any overpayment since April 15, 1997.

2. Kentucky Public Service Commission ("KPSC") Administrative Case No. 361 (a copy of which is attached as Exhibit E to Complainants' August 7, 2002 Brief on Remand) – The KPSC found that the rates tariffed by BellSouth, Cincinnati Bell Telephone and GTE (now Verizon) were in excess of the appropriate cost-based rates under the New Services Test and ordered the ILECs to issue refunds or credits back to April 15, 1997.

3. South Carolina Public Services Commission Docket No. 97-124-C and Order No. 1999-284 (a copy of which is attached as Exhibit F to Complainants' August 7, 2002 Brief on Remand) – The SCPSC found that BellSouth's payphone access services were overpriced under a New

[5] *In the Matter of Local Exchange Carrier Line Information Database*, Opinion and Order, CC Docket No. 92-24 (released August 23, 1993) ("*LIDB Order*").

Services Test analysis and ordered BellSouth to reimburse the IPPs that purchased the services back to April 15, 1997.

4. Louisiana Public Service Commission ("LPSC") Order No. U-22632 (a copy of which is attached as Exhibit G to Complainants' August 7, 2002 Brief on Remand) – The LPSC entered an order wherein the ILECs issued refunds dating back to April 15, 1997.

5. Pennsylvania Public Utility Commission Docket No. R-0097386700001 (a copy of which is attached as Exhibit H to Complainants' August 7, 2002 Brief on Remand.) – The PPUC entered an order wherein Bell Atlantic issued refunds dating back to April 15, 1997.

6. *In the Matter of the Independent Payphone Association of New York, Inc et al v. Public Service Commission of the State of New York and Verizon New York, Inc*., (a copy of that order is attached to the IPTA Brief on Exceptions as Exhibit I) – The Supreme Court of the State of New York held that the effective date of any tariff modifications resulting from Verizon's failure to comply with the New Services Test is April 15, 1997, and that Verizon must issue refunds for any excessive charges back to that date.

7. Indiana Utility Regulatory Commission ("IURC") Order No. 40830 (a copy of which is attached hereto as Appendix B) – The IURC entered an order wherein Verizon and SBC were ordered to issue refunds back to April 15, 1997 for the difference between the tariff rates and the cost based rates found by the IURC.

No less a decision is warranted by this Commission. SBC and Verizon are obligated to set their rates in accordance with the New Services Test effective as of April 15, 1997. The Commission's failure to make the refunds effective to that date is in violation of federal requirements.

D. Ordering refunds does not constitute retroactive ratemaking.

It is clear that under Section 276, the FCC *Payphone Orders*, and Part 771.600 of the Commission's regulations that SBC and Verizon had an affirmative duty to comply with that law by revising their rates to conform to the cost-based pricing standards as of April, 1997. As the Commission rightly held, both LECs failed in that obligation and charged rates that were impermissibly high.

Notwithstanding, the Order finds that rates that have been reviewed and approved by the ICC cannot later be subject to refunds. Order, at p. 43. Specifically, the Commission held that "if the refund obligation in the *Limited Waiver Order* were applied to approved rates including SBCs, that order would necessarily be contrary to Illinois law and the Supreme Court's holding in *Arizona Grocery*."[6] *Id*. The Order does not provide any explanation as to why such an order would be inconsistent with Illinois law. SBC and Verizon raised arguments with respect to retroactive ratemaking and the Filed Rate Doctrine. However, neither of these doctrines is applicable to this proceeding. Further, as explained above, ordering refunds is mandated. This Commission is not vested with the authority to grant any waiver extension of the FCC's beyond the effective date of April 15, 1997.

The instant case is not a case involving retroactive ratemaking. The principle of retroactive ratemaking is to fix rates based on evidence of cost, without allowing parties (both the utility and consumers) to reform those rates due to a change in future circumstances. Initially, the IPTA would note that the issue of retroactive ratemaking relies upon a Commission determination, after hearings, that the rates are appropriate. *Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill.2d 205 (1954) ("*Mandel Bros.*"). Prior to the entering of the Order herein, none of the rates at issue in this proceeding, and subject to the requested refund, have ever been reviewed or approved by this Commission for compliance with the *FCC's Payphone Orders* or Part 771.600. In fact, the very purpose of this proceeding is for the Commission's initial review of SBC's and Verizon's rates for compliance with these requirements, upon the petition of the IPTA. Now the Commission has found that the rates are not cost based and violate both requirements. Cost based rates effective April 15, 1997 are required to be imposed.

Further, Illinois courts have also recognized the fact that this Commission has exclusive jurisdiction over the issue of ordering refunds or restitution for excessive rates by public utilities.

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[6] *Arizona Grocery Co. v. Atchison, Topeka and Sante Fe Railroad Co.*, 284 U.S. 370 (1932) ("*Arizona Grocery*").

Village of Evergreen Park v. Commonwealth Edison Co., 296 Ill.App.3d 810, 812, 695 N.E.2d 1339 (1st Dist., 1998); *citing*, *Chicago ex rel. Thrasher v. Commonwealth Edison Co*., 159 Ill.App.3d 1076, 112 Ill.Dec. 46, 513 N.E.2d 460 (1987); *Citizens Utilities Co. v. Illinois Commerce Comm'n*, 157 Ill.App.3d 201, 109 Ill.Dec. 431, 510 N.E.2d 52 (1987); *Gowdey v. Commonwealth Edison Co*., 37 Ill.App.3d 140, 345 N.E.2d 785 (1976). In *Evergreen Park*, the Court specifically held that, because the essence of the plaintiffs claims were that the utility charged too much for the services it rendered (i.e., excessive rates), the Illinois Commerce Commission had exclusive jurisdiction over the plaintiffs' claim for restitution. *Id*., 296 Ill.App.3d at 818. The Illinois Court recognized the jurisdiction of the ICC to issue refunds.

In the instant case, the Commission is acting as a deputized federal agent implementing the orders of the FCC. The FCC, and other similarly situated state commissions, have ordered refunds for rates charged in excess of cost based rates required by the New Services Test. This Commission is required to do likewise.

E. The FCC has made the provision of cost based rates a prerequisite for SBC and Verizon's receipt of dial around compensation.

It is absolutely critical for this Commission to understand when reviewing this record that the FCC has inextricably linked the LEC's ability to collect dial around compensation for the LEC's payphones to the time when the LEC begins charging cost-based rates for network services made available to payphone providers. The FCC set up a *quid pro quo* wherein, in exchange for setting its payphone access rates at cost-based rates, the LEC would qualify to receive dial around compensation payments for calls made on the LEC's payphones.

The FCC ordered the LECs to have payphone access rates that comply with the New Services Test effective by April 15, 1997. The FCC further ordered that a LEC could not receive dial-around compensation until it satisfied the requirement of pricing network services at cost-based rates. The FCC held that:

> We must be cautious, however, to ensure that the LECs comply with the requirements we set forth in the [*Payphone Order*]. Accordingly, we conclude that ***LECs will be eligible for compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276***.

Payphone Reconsideration Order, at ¶ 131. Thus, to incent the LECs to meet their obligations of having cost-based rates, the FCC required the LECs to comply with Section 276 and the *FCC's Payphone Orders* as a prerequisite for the receipt of dial around compensation.

Unfortunately, as the Commission has rightly found, the incentive did not prevent SBC and Verizon from failing to comply with the New Services Test before beginning to collect dial around compensation. As the data in the record establishes, SBC and Verizon have collected hundreds of millions of dollars in dial around compensation since April 15, 1997 despite not having effective cost based rates. Both SBC and Verizon have in place today (and since 1997) rates that are excessive, non-cost-based, and in violation of the New Services Test. Notwithstanding their unlawful and excessive rates, both SBC and Verizon have been collecting dial-around revenues since 1997. In other words, the LECs have received the benefit of the FCC scheme by collecting dial-around compensation, without having met the condition precedent of cost-based rates as required by the FCC It is fundamentally improper for the Commission to permit SBC and Verizon to violate the federal requirements this Commission has underetaken to enforce by allowing them to receive compensation over the very time period for cost-based rates they did not provide.

For all of the above reasons, the IPTA urges the Commission to grant rehearing on the issue of refunds and to adopt the language proposed by the IPTA in its Proposed Order filed along with its Reply Brief. Only upon ordering refunds can the Commission implement the requirements of the *FCC's Payphone Orders,* and hold the LECs to task for their unjust and unlawful rates forced upon the IPPs for these last six years.

II. REHEARING ISSUE NUMBER 2.

VERIZON'S RATES FOR PAYPHONE ACCESS SERVICES SHOULD BE SET ACCORDING TO THE IPTA RECOMMENDATION OF INTERIM RATES UNTIL SUCH TIME AS THE COMMISSION ADOPTS LRSIC RATES FOR THE COMPANY.

As explained, the Commission rightly held that the direct cost of the payphone access services must be set at the LRSIC of the service using the Commission's Part 791 LRSIC rules. Order, at p. 35. The Commission further held that the overhead allocation applied to that direct costs should be set at the LEC's comparable UNE overhead factor. *Id*., at p. 36. "We therefore find that the use of the overhead loading factor recommended on page 33 of Staff's Initial Brief on reopening is appropriate for payphone services in Illinois." *Id*. As a general matter, the IPTA agrees with each of these findings, especially with reference to adoption of SBC's LRSIC and UNE cost studies have been reviewed and approved by the Commission

As explained by IPTA witness Starkey, this Commission has never approved any LRSIC rates (direct costs) or UNE overhead loadings (overhead allocation) for Verizon. While Verizon has submitted cost studies that it purports to comply with the LRSIC rules for direct costs, the IPTA has provided volumes of evidence demonstrating that such a claim is without merit. *See*, IPTA Initial Brief on Reopening, at pp. 49-51. Without additional clarity from the Commission as to the specific LRSIC rates and UNE overheads adopted in the Order, additional litigation and compliance proceedings are potential. Frankly, seven years is enough and the IPTA urges the Commission to grant rehearing on this issue and insert language in the Order that specifically identifies the rates adopted for both SBC and Verizon.

A. Verizon has never had its LRSIC cost studies reviewed and approved by the Commission.

The Commission held that Verizon must use LRSIC cost studies in setting its direct costs under the New Services Test. Despite Verizon's claims that its cost studies submitted in the instant proceeding purport to be in compliance with the Commission's LRSIC rules, this is thoroughly rebutted by the extensive evidence presented by the IPTA.

As of the adoption of the Order, Verizon has not submitted any forward-looking LRSIC cost studies that have been reviewed and approved by the Commission to ensure their compliance with the Commission's cost study regulations. Significantly, the Commission has not identified in any proceeding the cost of capital, depreciation rates, fill factors, and methodologies Verizon should use in identifying a forward looking economic cost for Verizon's services. Furthermore, the call screening, blocking, and answer supervision cost studies submitted by Verizon in this proceeding are admittedly not forward-looking cost studies, as is required. Order, at p. 35. ("By applying the Part 791 Rules, the Commission can be assured that it has appropriately applied the forward-looking cost methodology to determine compliance with the NST.")

The IPTA submits that the Commission should clarify that Verizon should use the Staff-adjusted LRSIC cost studies from Verizon's cost docket case ICC Docket No. 96-0503[7] as the

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[7] As Mr. Starkey explained, even though the Commission has not made any ruling regarding the specific cost studies in Docket No. 96-0503, the Commission's Staff has spent considerable time reviewing those cost studies for compliance with the Commission's cost of service rules, Part 791. IPTA Ex. 6.0, p. 49 (Starkey Direct). In fact, after reviewing the cost study data submitted by Verizon in Docket 96-0503, Commission Staff requested that Verizon modify certain portions of the studies to more appropriately comply with the terms of Part 791. Although the Commission Staff was critical of the LRSIC cost studies in Docket 96-0503, the cost studies, as modified by Staff, is the best evidence before the Commission and should serve as the basis for establishing the interim rates Verizon assesses the IPPs for payphone access services. *Id*. at p. 47. After the Commission finally rules on the Verizon cost studies and Verizon has filed a compliant tariff, the parties can true-up any differences effective to April 15, 1997.

underlying direct costs in this proceeding on an interim basis until the Commission has the opportunity to review and approve new Verizon's LRSIC cost studies. Any changes that the Commission funds in its further review of Verizon's LRSIC can be adjusted at that time to reflect the appropriate forward-looking cost.

The Commission should grant this Application and clarify that the best evidence of record of the appropriate direct costs of Verizon are the LRSIC studies adjusted by Staff and not those proffered by Verizon.

B. Verizon has never had any UNE cost studies reviewed and approved by the Commission for use as overhead allocations.

The IPTA concurs with the Commission's determination to use forward-looking comparable UNE overhead loading factors in setting Verizon's payphone access service rates. The IPTA further agrees with the Commission that the overhead allocation methodologies proposed by Verizon in this proceeding simply are not supportable.

Again, this Commission has never had the opportunity to review, analyze, and adopt UNE cost studies for Verizon. The IPTA urges the Commission to fix a specific interim rate, pending Verizon's compliance with the UNE overhead requirement.

Verizon's existing rates fail to comply with the New Services Test. The IPTA recommends that the Commission establish interim rates subject to the appropriate refund or true-up, based on the FCC-adopted New Services Test formula adopted by the Commission. This would mean result in the following interim rates for Verizon's Customer Owned Coin Telephone Service:

	GTE Modified LRSIC Plus Overhead	EUCL And No-PICC	TARIFF RATE
COCOT FLAT RATE			

Class A	*******	**$13.16**	$2.47
Class B	*******	**$13.16**	$7.36

IPTA Ex. 6.0, pp. 49-50 (Starkey Direct).

Because Verizon has failed to provide any cost studies addressing Coin Line Service, the IPTA recommends the adoption of interim rates based upon the percentage difference between the tariffed Customer Owned Coin Telephone service and its TELRIC-plus-common-cost counterpart and applying that percentage difference to the tariffed Coin Line Service until this Commission has had the chance to review and approve Verizon's LRSIC cost studies for these services. *See*, IPTA Ex. 6.0, pp. 50-52. Verizon assesses a $4.31 no-PICC charge against those IPPs who do not choose to pick a long distance carrier. IPTA Ex. 2 at 1-3 (Pace Rebuttal). Comparatively, in the situation where an IPP has selected a long distance provider, the LEC need not take the $4.31 charge into account in the rates assessed that particular IPP. *Wisconsin Order* ¶ 60.

	Proxy LRSIC Plus Common	SLC And no-PICC	TARIFF RATE
Coin Line	*******	$13.16	13.92

IPTA Ex. 6.0, p. 52.

Again, because Verizon failed to provide any cost studies supporting the other central office based features (i.e., billed number screening, call screening, answer supervision, etc.), the IPTA recommends that Verizon be required to perform cost studies consistent with the Commission's criteria when it issues a final order in Verizon's cost case. In the interim, Verizon should assess no charges for these rate elements.

The IPTA believes that the ultimate conclusions reached in the Order will be legally sustainable. However, in order to avoid confusion, gamesmanship and, ultimately, additional compliance litigation, the IPTA urges the Commission to grant this rehearing and adjust the order as described above.

III. REHEARING ISSUE NUMBER 3.

THE ORDER'S DETERMINATIONS ON IMPUTATION FAILS TO ACCOUNT FOR ALL THE EXPENSES ASSOCIATED WITH VERIZON'S PAYPHONE OPERATIONS.

The Order properly concludes that Verizon is: 1) subject to the imputation requirements imposed by Section 13-505.1 of the Illinois Public Utilities Act, and 2) that Verizon has failed imputation. Order, at pp. 11-13. However, the Order fails to properly apply the clear language of Section 13-505.1(a)(1) with respect to certain aspects of Verizon's proposed imputation analysis. Section 13-505.1(a)(1) requires that Verizon must impute to its payphone operations the "specifically tariffed premium rates for the noncompetitive services . . . or their functional equivalent …… that are utilized to provide" Verizon's payphone services. The PICC and E911 are two such noncompetitive services utilized to provide Verizon's payphone services. The Order fails to impute E911 surcharges that are expressly required by state statute to be assessed against the payphones of each telecommunications carrier, including Verizon.

The Illinois Emergency Telephone System Act provides that surcharges for E911 services shall be assessed against telecommunications carriers for their pay telephone services.

> **750/15.3. Telecommuncations carriers – Surcharge**
>
> § 15.3 (a) The corporate authorities of any munipality or any county may … impose a monthly surcharge on billed subscribers of network connection provided by telecommunication carriers engaged in the business of transmitting messages by means of electricity originating within the corporate limits of the municipality

> or county imposing the surcharge at a rate per network connection determined in accordance with subsection (c) …
>
> (b) … With respect to network connections provided for use with pay telephone services for which there is no billed subscriber, the telecommunications carrier providing the network connection shall be deemed to be its own billed subscriber for purposes of applying the surcharge.
>
> 50 ILCS 750/15.3.

Therefore, Illinois statutes expressly require the imputation of E911 surcharges to pay telephones. The failure to include this expense for Verizon pay telephones is a violation of both Section 750/15.3 of the Emergency Telephone System Act and Section 13-505.1 of the Public Utilities Act.

In addition, the Order fails to impute the "premium tariffed rates" in Verizon's payphone operations. Each of these failures is improper as a matter of law. While the Commission held that Verizon has unlawfully subsidized its payphone operations for years, the Commission erred in its failure to include all of Verizon's imputed costs..

A. The Order Erroneously Fails to Require Verizon to Impute the PICC Charge.

Verizon's imputation analysis fails to impute a $4.81 tariffed rate per line per month for the PICC that Verizon imposes on all other lines, including on IPPs that do not presubscribe to a particular IXC. IPTA Ex. 2.0, p. 1-3 (Pace Surrebuttal). By failing to impute the PICC charge, Verizon under reports its imputed costs by ******* ($4.81 X****** phones X 12 months.)

The PICC is a federally approved charge requested by Verizon to recover a portion of the non-traffic sensitive cost incurred in providing services to access line subscribers. *Id*. The charge is imposed by Verizon on all lines and is implemented or, when a customer chooses to presubscribe to a particular interexchange carrier or, conversely, when an IPP chooses not to presubscribe to an interexchange carrier. *Id*. IPTA witness Mr. Pace explained that an IPP will no-PICC their access lines to minimize fraudulent 1+ interLATA calls being made over the LECs network. IPTA Ex. 2.0 at p. 2-3 (Pace Surrebuttal). This IPP fraud prevention effort is in lieu of the monitoring of the line that Verizon provides to the Verizon dumb payphone to prevent fraud.

The FCC has already required that LECs not be allowed to discriminate against IPPs in fraud protection. *Order on Reconsideration,* par. 149. The Public Utilities Act further specifies that the LEC must impute to itself the premium tariffed rate for all noncompetitive services or their functional equivalent. No-PICC is the IPPs' functional equivalent to the fraud prevention provided by Verizon's monitoring of its payphone lines. Because the no-PICC rate is a noncompetitive tariffed rate imposed on IPPs to prevent fraudulent calls being completed over Verizon's network, it is a charge that also must be imputed to each of Verizon's payphones. *Id*.

The Order finds that it is appropriate under the imputation rules to not include the PICC because that charge is not assessed directly against the IPP, but rather the presubscribed IXC. Order, at p. 12. This conclusion ignores the fact that the FCC in its recent *PICC Order* noted that historically, payphone providers have been charged these PICC charges by long distance carriers. *PICC Order*, at ¶ 3. The evidence, however, reflects that Verizon's imputation analysis imputes the amount of the PICC for only ***** of the Verizon public payphones despite Verizon's imposition of this charge on all lines of competing carriers. Verizon Ex. 8.0, at p. 6; Appendix SAO-1 (confidential). The fundamental principle of imputation is that the LEC is not free to choose not to charge itself for that which it charges competing carriers. The controlling incident is whether the LEC charges a competing carrier for the noncompetitive services, i.e., the PICC, not whether the LEC's competitive service elects to pass on the charge to its retail customers. Once the noncompetitive service, or its functional equivalent, is charged to a competing carrier, Section 13-505.1 mandates that the charge be imputed to the competitive LEC's service. Verizon does not include any PICC amounts for Verizon's remaining public payphones that are presubscribed, or any of the Verizon semi-public payphones in violation of Section 13-505.1. *Id*.

The imputation requirements imposed by the Commission require it to amend the order to require that Verizon impute the PICC/No-PIC on all of its pay telephones. To the extent Verizon collects PICC/No-PICC revenues on semi public payphones, those revenues may be considered in analyzing whether Verizon payphone services pass the imputation test.

B. The Order Does Not Impute the Premium Tariff Rates, as Required by Section 13-505.1(a)(1.)

In addition, the Order fails to impute to Verizon's payphone operations the $6.35 per line per month charge it assesses IPPs for answer supervision and $2.04 for call screening and blocking. IPTA Ex. 2.0, at pp. 3-4 (Pace Rebuttal). Again, call screening and blocking are fraud protection devices employed by IPPs to substitute for functionally equivalent fraud prevention provided by Verizon for its payphones. Verizon is prohibited from discriminating against the IPPs in fraud prevention and is required to impute the premium tariffed rate for these services. However, the Order finds that these services are optional and do not "affect the ability of payphone providers to compete with Verizon." Order, at p. 13. This conclusion is in direct conflict with the actual evidence submitted. In fact, these features are services the IPPs must subscribe for the functional equivalent of features that are ***inherent*** in the Coin Line services that Verizon makes available to its own payphones. *Id*.

Answer supervision is a feature that provides a signal back to the originating payphone when a call is completed. All of Verizon's payphones receive such notification, or a functional equivalent, of the completion of calls. Screening services allow a terminating interexchange carrier to recognize that a call is originating from a payphone, and that the interexchange carrier should not bill a call (i.e., a collect call) back to the originating phone. *Id*. The Commission must note that Verizon provides itself both of these services as an inherent feature or function of the switch. However, for the IPP to get access to these same services, it must order them separately from Verizon.

Verizon imposes an additional charge for both answer supervision and call screening and blocking against IPPs that subscribe to COCOT service in order to fill the need for a functional equivalent to the central office signaling inherently provided in the switch to Verizon's own payphone operations. Section 13-501.1 of the Public Utilities Act and Part 792 of the Commission's regulations require Verizon to impute the call screening and blocking premium tariffed rates to its own payphone division.

As such, Verizon must impute these premium tariffed rates against its own payphone division. It did not do so in the proposed imputation analysis. By failing to impute the answer supervision tariffed rates, Verizon under reports its imputed costs by an additional ******** ($6.35 X ******* phones[8] X 12 months.) By failing to impute the call screening and blocking charge, Verizon under reports its imputed costs by ********** ($2.04 X ******** phones X 12 months.)

C. With The Adjustments, Verizon's Payphone Operations Will Fail Imputation by more than $900,000.

The Order concludes that Verizon's payphone operations fails imputation by $99,326 (Proposed Order, p. 13.) However, because Verizon failed to also impute the PICC/No-PIC charge to all of its payphones, as well as the rate elements for Answer Supervision, Call

[8] According to IPTA Cross Exh. 2.0, Verizon did impute the answer supervision charge on approximately 25 of its phones during 1999, but not the remaining ******phones.

Screening and Blocking, the Proposed Order should be modified to find that Verizon's payphone operations have failed imputation by $921,705 (*******+*******+*******+******) for each year.

WHEREFORE, for the above stated reasons, the Illinois Public Telecommunications Association respectfully requests the Commission to grant this Application for Rehearing and to amend the Order as follows:

1. hold SBC and Verizon accountable for their unlawful violations of Section 276, the *FCC's Payphone Orders*, the FCC's regulations incorporating the New Services Test, and Part 771.600 of the Commission's rules by granting refunds to the members of the IPTA dating back to April 15, 1997. The refunds should be calculated as the difference between the unlawful and excessive tariffed rates rejected by this Commission, and the forward-looking cost-based rates adopted by this Commission;

2. specify in this Order the exact rates adopted for both SBC and Verizon; and

3. find that Verizon has failed imputation for the additional reasons stated herein, which would amend the Commission's conclusions to find an annual subsidization of $921,705.

Respectfully submitted,

THE ILLINOIS PUBLIC
TELECOMMUNICATIONS ASSOCIATION

____

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